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NO. 82-6922

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1982

JESSE DE LA ROSA,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

On Petition For Writ Of Certiorari
To The Texas Court Of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. WHETHER PETITIONER'S WRITTEN CONFESSIONS WERE ADMISSIBLE AS HAVING BEEN OBTAINED DURING CUSTODIAL INTERROGATION FOLLOWING THE ADMINISTRATION OF WARNINGS SATISFYING THE REQUIREMENTS OF MIRANDA V. ARIZONA?

II. WHETHER THE COURT BELOW CORRECTLY HELD THAT PETITIONER'S WRITTEN CONFESSIONS DID NOT RESULT FROM AN UNREASONABLE DELAY IN BRINGING PETITIONER BEFORE A MAGISTRATE?

III. WHETHER THE COURT BELOW CORRECTLY HELD THAT PETITIONER WAS NOT DENIED THE RIGHT TO A FAIR AND IMPARTIAL JURY AS THE RESULT OF OCCURRENCES IN THE JURY ROOM DURING THE DELIBERATIONS ON PUNISHMENT?

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RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES the State of Texas, Respondent herein, by and through its attorney, the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The opinion of the Court of Criminal Appeals of Texas, which is not yet published, is reproduced in Appendix A to the Petition for Writ of Certiorari. The order of the Texas Court of Criminal Appeals denying rehearing is reproduced in Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court under the provisions of 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner bases his claims upon the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

The record reflects that Petitioner was indicted in April 23, 1980, in Bexar County, Texas, for the murder of Masoud Ghazali, while in the course of committing robbery. On June 22-23, 1981, an evidentiary a hearing was held in the 144th Judicial District Court of Bexar County, Texas, on Petitioner's motion to suppress the confession. Trial began on July 9, 1981, and on July 16, 1981, the jury found Petitioner guilty of the capital offense. On July 16, 1981, after a punishment hearing, the jury answered affirmatively the special issues submitted pursuant to Article 37.071, V.A.C.C.P. Accordingly, punishment was assessed at death. A hearing was held on Petitioner's motion for new trial with the court overruling the motion on January 19, 1982. Petitioner appealed his conviction and sentence to the Court of Criminal Appeals of Texas, which on March 9, 1983 affirmed the conviction and sentence. Rehearing was denied on April 13, 1983.

STATEMENT OF THE FACTS

On August 27, 1979, at approximately 5:30 p.m., Jesse De La Rosa was arrested pursuant to a warrant of arrest for an aggravated robbery committed the same night of the instant offense. He was read Miranda warnings in english by Officer Michalec from the standard police issued warning card (R. Vol. I, 211, 244-245) [1/] and given an explanation of those rights at the scene of the arrest (R. Vol. I 212). He was also administered Miranda warnings in spanish by Officer Vaquera at the scene of the arrest (R. Vol. XV 211; Vol. XVII 107, 110). He was then taken directly to the police station along with his wife, brother, and a friend in whose company he was when arrested.

1/ Respondent utilizes the same record citations as Petitioner.

They arrived there at approximately 6:00 p.m.; thereafter, Petitioner was taken directly to the identification section and then to the robbery office for an interview. (R. Vol. I 212; XIII 82-92, 138-141; Vol. XVII 107, 117).

Officer Michalec testified that when he asked Petitioner whether he wanted an attorney present, Petitioner replied he preferred to talk to his brother and his friend. He permitted Petitioner to talk to them in private and after his brother and friend came out of the office Petitioner said he wanted to give a confession (R. Vol. I 212; Vol. XV 103-04).

At the pretrial hearing Officer Michalec testified he divided the confession into two statements since it related to two distinct offenses (R. Vol. I 213-17). The first statement relating to the aggravated robbery, began at 6:54 p.m. The second statement regarding the capital murder offense began at 8:02 p.m. (R. Vol. XXI State's Exhibits Nos. 32, 38). The first statement was excluded from the evidence presented at trial on the merits (R. Vol. XV 112-18, 122).

Officer Michalec testified that he carefully advised Petitioner of his constitutional rights prior to taking Petitioner's confession to the capital murder offense (R. Vol. I 217-220). This included the admonishment regarding the punishment applicable to a capital murder offense. Officer Michalec testified he had prior contact with Petitioner, and in his opinion Petitioner was an intelligent person who understood his rights when explained to him and voluntarily signed the statements in the presence of two witnesses after reading them and making corrections, without having been promised anything or coerced in any manner (R. Vol. I 220-24; 247-48; Vol. XVI 107-16, 151-52).

Both at the pretrial hearing and at trial on the merits Officer Coronado, who was present at the scene of arrest and intermittently at the office where Petitioner was questioned, testified he observed Officer Michalec read Petitioner his rights

from the standard form issued by the San Antonio Police Department and Petitioner appeared to have understood them. Officer Coronado denied any coercion, duress, or threats in his presence (R. Vol. II 4-16; Vol. XVII 46-49).

The two persons who witnesses Petitioner's signature on the statement in which he confessed to the capital murder offense, testified during trial on the merits. One testified Petitioner read the statement in her presence and that he appeared responsive. The other witness testified she did not observe anything unusual (R. Vol. XV 177-78, 199).

Officer Michalec testified, both at the pretrial hearing and before the jury, that when Petitioner was arrested and they arrived at the police station at approximately 6:00 p.m., there was no magistrate available, since no magistrate came on duty until 8:00 p.m. (R. Vol. I 260; Vol. XV 160-63). Petitioner began to give his confession at 6:54 p.m. Officer Michalec interrupted Petitioner's confession to break it down into two statements, since the confession involved two distinct offenses, Petitioner was warned at 8:00 p.m. pursuant to Article 38.22, and began to give his second statement at 8:02 p.m. (Tr. 1- 6).

Pursuant to Petitioner's second amended motion for new trial, the trial court held a hearing at which all twelve jurors testified. Six jurors could not recall any mention of parole (R. Vol. XX 125, 136, 151, 161-62, 176-77). A seventh juror was not asked either by counsel for Petitioner or the State any questions regarding discussion of parole during deliberation (R. Vol. XXI 39-45). The four jurors testified that a mention of parole was generally made, but that it was not discussed or related specifically to the Petitioner (R. Vol. XX 29-37, 56-70, 187-196, 199-206, 211-223, 258-259). Each juror testified that the mention of parole did not influence his or her verdict (R. Vol. XX 37, 63, 204, 223).

Eight jurors recalled a statement being made by Juror Franklin about his stepfather committing a second offense after

serving time in the penitentiary. Each of the jurors testified that the remark was a passing comment and was not considered by the jury in answering special issue number two adversely to Petitioner (R. Vol. II 32-37, 42-48, 58-63, 126-33, 142-46, 163-64, 192-94, 260-61). Seven of the eight jurors recalled the remark being made during punishment deliberations at a time when the jurors were talking in group and looking at the evidence (R. Vol. II 32-33, 42-44, 76-79, 126-28, 142-48, 164, 271). The eighth juror recalled the remark being made after the verdict had been rendered (R. Vol. XX 193-94).

After the presentation of evidence both defense counsel and the prosecutor presented comprehensive oral arguments (R. Vol. XX 287-362). Following an overnight recess, the trial court overruled Petitioner's second amended motion for new trial (R. Vol. XX 363-364).

SUMMARY OF ARGUMENT

There are no special or important reasons to review this case. The issues presented involve only the application of well-settled constitutional principles to the facts involved herein. This Court is without jurisdiction to consider Petitioner's claim that the written confessions were inadmissible, as having been obtained during custodial interrogation, following the administering of explanatory warnings which failed to satisfy the requirements of Miranda v. Arizona, 384 U.S. 436 (1966), since Petitioner has not presented the precise issue raised herein to the Texas Court of Criminal Appeals. In any event, this case turns entirely on the facts established in the state court; this Court should decline to review factual questions.

Petitioner's confession to the capital murder offense was made after the administering of complete Miranda warnings, at the scene of the arrest and immediately prior to custodial interrogation. The confessions were properly admitted at trial.

The court below correctly held that Petitioner's written confession did not result from an unreasonable delay in bringing Petitioner before a magistrate. The court's holding is fully supported by the evidence presented in this case.

The court below held that Petitioner was not denied the right to a fair and impartial jury trial as the result of occurrences in the jury room during the deliberations on punishment. Pursuant to Petitioner's second amended motion for new trial, a full and fair hearing was held in the trial court, at which each juror testified. Based on the evidence adduced at the hearing and the arguments of counsel, the motion for new trial was correctly denied.

REASONS FOR DENYING THE WRIT

I.

THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 17 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right but of judicial discretion, and will be granted only when there are special and important reasons therefor. Petitioner has advanced no special or important reason in this case and none exists. Further, this case presents only the question whether well-settled constitutional principles were correctly applied to the facts of this case. Thus, no important question of law is presented here.

II.

THE COURT IS WITHOUT JURISDICTION TO CONSIDER PETITIONER'S CLAIM BECAUSE IT WAS NOT PRESENTED TO THE TEXAS COURT OF CRIMINAL APPEALS.

Petitioner contends that his written confessions were inadmissible, as having been obtained during custodial interrogation, following the administration of explanatory warnings regarding his constitutional rights which failed to satisfy the requirements of Miranda v. Arizona, 384 U.S. 436 (1966). This contention was not presented to the Texas Court of

Criminal Appeals in Petitioner's appeal of his conviction. The grounds of error asserted by Petitioner in his appellate brief relevant to the failure to take Petitioner before a magistrate, and asserted by Petitioner as raising the claim now presented, are reproduced as Appendix I to the Brief in Opposition.

Petitioner complained to the Texas Court of Criminal Appeals that the failure to timely take Petitioner before a magistrate the Petitioner was not rendered harmless by the officer's giving of Miranda warnings, inasmuch as the officer did not properly advise Petitioner of his right to counsel and the officer's warnings may not be substituted for the magistrate's. That Petitioner did not raise the issue of whether Miranda is satisfied where an officer initially reads the Miranda warnings off a standard card, and subsequently undertakes on his own to give the accused an explanation of those rights in an inadequate, inaccurate or misleading manner, and that the Texas Court of Criminal Appeals did not construe such claim as being raised is apparent from Petitioner's arguments in his appellate brief (Appendix I to the Brief in Opposition) and the court's subsequent discussion of Petitioner's claims (Appendix A to Petition for Writ of Certiorari at 5).

The cases are legion that this Court will not decide issues raised for the first time on petition for writ of certiorari on or appeal and that the Court will not decide federal questions not raised and decided in the court below. E.g., Tacon v. Arizona, 410 U.S. 351, 352 (1973); Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In articulating this requirement, the Court has stressed the long-standing nature of the rule: "[I]n Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. 'If both of these do not appear on the

record, the appellate jurisdiction fails.' 10 Pet. 368, 391." Cardinale v. Louisiana, supra, at 439. To properly invoke the jurisdiction of the Court, it is crucial that the federal question not only be raised in the state proceedings, but that it be raised at the proper point. Beck v. Washington, 369 U.S. 541, 550 (1962); Godchaux Co., Inc. v. Estopinal, 251 U.S. 179, 181 (1919).

Respondent submits that in view of Petitioner's failure to sufficiently and properly raise the issue presented here below, the failure of the state court to pass on this issue, the desirability of giving the state the first opportunity to address the issue, the application for certiorari should be denied for want of jurisdiction. Cardinale v. Louisiana, supra, at 439.

III.

REVIEW SHOULD BE DENIED AS ONLY QUESTIONS OF EVIDENCE AND FACTUAL FINDINGS ARE INVOLVED

The petition for writ of certiorari does not raise unsettled questions of law. The issues addressed involve nothing more than evidentiary questions and factual determinations made by the state trial and the state appellate courts. The state courts below carefully considered Petitioner's claims of whether his written confessions were inadmissible as having been obtained during custodial interrogation resulting from unreasonable delay in bringing him before a magistrate and of whether he was denied the right to a trial by a fair and impartial jury because of occurrences in the jury room during deliberations on punishment before rejecting them.

The question presented for review relative to Petitioner's claim that his confessions were inadmissible as having been obtained during custodial interrogation resulting from unreasonable delay does not present a substantial question worthy of this Court's review. In Brown v. Allen, 344 U.S. 443 (1953), this Court expressly held that delay in arraignment of a petitioner does not present a claim of constitutional dimension under the Fourteenth Amendment:

> If the delay in the arraignment of petitioner was greater than that which might be tolerated in a federal criminal proceeding, due process was not violated. Under the leadership of this Court a rule has been adopted for federal courts, that denies admission to confessions obtained before prompt arraignment notwithstanding their voluntary character. (Citations omitted). This experiment has been made in an attempt to abolish the opportunities for coercion which prolonged detention without a hearing is said to enhance. But the federal rule does not arise from constitutional sources. This Court has repeatedly refused to convert this rule of evidence for federal courts into a constitutional limitation on the states (citations omitted).

Id. at 443; see, Gallegos v. Nebraska, 342 U.S. 55 (1951); Smith v. Heard, 315 F.2d 692 (5th Cir.), cert. denied, 375 U.S. 883 (1963). The issue presented involves nothing more than the state appellate court's application of well-established principles of state law and factual findings by the court below.

The question presented for review relative to the jury misconduct during punishment deliberations presents nothing more than the trial court's exercise of its sound discretion in precisely the manner that this Court has recognized as safeguarding Petitioner's due process rights. As this Court noted in Smith v. Phillips, 455 U.S. 209, 217 (1982):

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. . . . Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen. Such determinations may properly be made at a [post-trial] hearing . . .

The issue presented here concerns credibility determinations and findings of fact by the state courts as to the occurrence of jury misconduct.

IV.

PETITIONER'S WRITTEN CONFESSIONS WERE ADMISSIBLE AS HAVING BEEN OBTAINED DURING CUSTODIAL INTERROGATION FOLLOWING THE ADMINISTRATION OF WARNINGS SATISFYING THE REQUIREMENTS OF MIRANDA V. ARIZONA.

The record reflects that Petitioner was given Miranda warnings at least four separate times prior to giving his confession on the capital murder charge -- twice at the scene of the arrest, once immediately prior to the taking of the confession on the aggravated robbery offense, and once immediately prior to the taking of the confession on the capital murder charge. Petitioner does not contest that the warnings read from the standard police warning card are sufficient to satisfy the dictates of Miranda v. Arizona, 384 U.S. 436 (1966); but rather, asks this Court to address the constitutional effectiveness of warnings under circumstances where the officer subsequently undertakes to explain those rights in an inadequate, inaccurate or misleading manner. Specifically, Petitioner contends that the explanations given Petitioner at the scene of the arrest were insufficient to inform him of his constitutionally protected rights.

> I was explaining that . . . he has the right to get an attorney if he wants one if not an attorney will be appointed free of charge and I generally try to make -- I tell them that it will take some time before the Court will get around to appointing a lawyer for them. And, explained to him that really what the whole warning really means they don't have to say anything to us if they don't want to.

(R. Vol. I 211).

In California v. Prysock, 453 U.S. 360 (1981), this Court rejected a rule requiring that the content of Miranda warning be a "virtual incantation" of the precise language contained in Miranda v. Arizona, 384 U.S. 436 (1966). This Court held:

> This Court and others have stressed as one virtue of Miranda the fact that the giving of the warnings obviates the need for a case-by-case inquiry into the actual voluntariness of the admissions of the accused. See Fare v. Michael C., 442 U.S. 707, 718, 99 S.Ct. 2560, 2568, 61 L.Ed.2d 197 (1979); Harryman v. Estelle, [616 F.2d 870 (5th Cir.), cert.

> denied, 449 U.S. 860, 101 S.ct. 161, 66 L.Ed.2d 76 (1980)]. Nothing in these observations suggests any desirable rigidity in the form of the required warnings.
>
> Quite the contrary, Miranda itself indicated that no talismanic incantation was required to satisfy its strictures. The Court in that case stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admission of any statement made by a defendant." 384 U.S. at 476, 86 S.Ct., at 1629 (emphasis supplied). See also id, at 479, 86 S.Ct., at 1630. Just last Term in considering when Miranda applied we noted that that decision announced procedural safeguards including "the now familiar Miranda warnings . . . or their equivalent." Rhode Island v. Innis, 446 U.S. 291, 297, 100 S.Ct. 1682, 1688, 64 L.Ed.2d 297 (1980)(emphasis supplied).

453 U.S. at 359-60.

The explanatory warnings given by Officer Michalec in addition to the warning read off the standard police issued warning card (which warning were a "virtual incantation" of the precise language contained in Miranda) are an effective equivalent. Taken in their entirety, they import the clear message that Petitioner did not have to say anything if he desired not to, that he had a right to have an attorney present, and that an attorney would be appointed free of charge. Moreover, unlike the warnings in the cases cited by this Court in Prysock, the explanatory warnings given Petitioner do not link the appointment of counsel to a future point in time after police interrogation. California v. Prysock, 453 U.S. at 360-61; citing, United States v. Garcia, 431 F.2d 134 (9th Cir. 1979)(per curiam) (Defendant could have an attorney appointed "when you first appear before the U. S. Commissioner or the court"); People v. Bolinski, 260 Cal.App.2d 705, 67 Cal.Rptr. 347 (1968) ("if he was charged", counsel would be appointed). At worst, the explanations convey the message that should Petitioner so desire, an attorney will be appointed before conversing with the officers, but it will take some time.

Overlooked by Petitioner in his argument that the explanatory warnings given were insufficient to comply with Miranda is the fact that additional warnings were given subsequent to the explanations and immediately prior to the taking of the capital murder confession. Petitioner does not contend that these warnings were insufficient to satisfy the dictates of Miranda. Furthermore, the record reveals that the warnings given immediately prior to the taking of the capital murder confession were a "virtual incantation" of the precise language of Miranda (R. Vol. XVI 90-92).

V.

THE COURT BELOW CORRECTLY HELD THAT PETITIONER'S WRITTEN CONFESSIONS DID NOT RESULT FROM AN UNREASONABLE DELAY IN BRINGING PETITIONER BEFORE A MAGISTRATE

The Texas Court of Criminal Appeals found that the confession admitted at trial was not the result of an unreasonable delay in taking Petitioner before a magistrate and that no evidence before the jury raised an issue that the confession was causally connected to any unreasonable delay. That Court held:

> The record at the hearing on the motion to suppress shows appellant was arrested at about 5:30 in the afternoon, arrived at the police station about 6:00, and gave two confessions, the first at about 7:00 p.m. and the second at about 8:00 p.m. Appellant was warned of his constitutional rights when he was arrested and again when each confession was taken. When asked if he wanted an attorney, he said he would rather see his brother. After seeing his brother appellant said he wanted to confess, and the confessions were given. Viewing the evidence in the light most favorable to the trial court's ruling, the confession admitted at trial was not the result of any delay in taking appellant before a magistrate.
>
> The jury was charged on the admissibility of the confession under Art. 38.22, V.A.C.C.P., and the facts of the case. The trial court refused to submit a charge under Art. 15.17, supra. The evidence before the jury showed appellant arrived at the police station after arrest at about 6:00 p.m., that the night magistrate was not on duty until 8:00 p.m., and that the confession was taken at 8:00 p.m. No evidence before the jury raised an issue that the confession was causally connected to any unreasonable delay.

De La Rosa v. State, at 5-6 (Appendix A to Petition for Writ of Certiorari at 5).

Article 15.17, V.A.C.C.P., "Duties of Arresting Officer and Magistrate," provides:

> In each case enumerated in this Code, the person making the arrest shall without unnecessary delay take the person arrested or have him taken before some magistrate of the county where the accused was arrested.

Tex. Code Crim. Proc. Ann. art. 15.17 (Vernon 1977) (emphasis added). Under Texas law, the failure to take an accused before a magistrate prior to obtaining a confession does not in and of itself render a confession inadmissible. Texas requires a showing of an unreasonable delay in taking the defendant before a magistrate, and a causal connection between that delay and the making of the confession. Maloy v. State, 582 S.W.2d 125 (Tex.Crim.App. 1979); Myre v. State, 545 S.W.2d 820 (Tex.Crim.App. 1977). The court below, applying the proper standard of review for determining reversible error for admission of a confession when Article 15.17, V.A.C.C.P., is implicated, correctly held the confessions admissible.

VI.

THE COURT BELOW CORRECTLY HELD THAT PETITIONER WAS NOT DENIED THE RIGHT TO A FAIR AND IMPARTIAL JURY AS THE RESULT OF OCCURRENCES IN THE JURY ROOM DURING THE DELIBERATIONS ON PUNISHMENT

In Smith v. Phillips, 455 U.S. 209 (1982), this Court held that a post-trial hearing in a state court is constitutionally sufficient under the Due Process Clause of the Fourteenth Amendment to decide allegations of juror misconduct. The record in this case reveals that a post-trial hearing was held in the trial court pursuant to Petitioner's second amended motion for new trial to determine whether any juror misconduct or any discussion of matters outside the record had occurred during the jury's deliberations on punishment (R. Vol. XX). The trial court heard the testimony of each of the twelve jurors, with each juror being subject to extensive direct examination and cross-examination (R. Vol. XX 27-286). After the presentation of testimony,

the trial court heard comprehensive arguments from both the defense counsel and the prosecutor (R. Vol. XX 287-362). Following an overnight recess, the trial court overruled Petitioner's second amended motion for new trial (R. Vol. XX 363-364).

Petitioner contends that the post-trial hearing conducted in this case is insufficient to comport with Due Process. He erroneously argues that because the trial court is precluded from summing up, discussing or commenting on the evidence under Art. 40.07 of the Texas Code of Criminal Procedure, it is precluded from making factual findings as to jury misconduct.

The factual determinations of the trial court are implicit in its overruling the motion for new trial. Under Texas law, a motion for new trial must issue upon a showing that detrimental evidence outside the record was received by the jury during its deliberations. Stephenson v. State, 571 S.W.2d 174 (Tex.Crim. App. 1978); Heredia v. State, 528 S.W.2d 847 (Tex.Crim.App. 1975). Receipt of evidence is a question not only of fact, but of degree. Passing remarks during deliberations about a fact not supported by the evidence does not constitute receipt of other evidence. Stephenson v. State, supra, 571 S.W.2d at 176. If promptly suppressed, not discussed or considered by a jury, such remarks are not detrimental and do not require reversal of the case. Broussard v. State, 505 S.W.2d 282, 284 (Tex.Crim.App. 1974); see also, Bertsch v. State, 379 S.W.2d 657, 660 (Tex.Crim.App. 1964) ("off hand remark" in a death penalty case did not warrant reversal); McIlveen v. State, 559 S.W.2d 815, 821 (Tex.Crim.App. 1978) (remark not discussed). Discussions of parole may constitute receipt of other evidence; however, where the jury's ultimate decision on punishment was not affected by the discussion of parole law, such does not constitute a denial of a fair trial. See, Munroe v. State, 637 S.W.2d 475 (Tex.Crim.App. 1982), and cases discussed therein.

In the instant case, it is obvious that the trial court viewed Juror Franklin's remark about his stepfather as a passing remark, promptly suppressed and not discussed or considered in deliberations on the special issue. The remark was quickly and inadvertently made, and not intended to relate to any of the special issues. Of the seven jurors who heard a statement, each testified the remark was of no particular import, and not warranting any particular attention. Further, the entire discussion lasted approximately thirty seconds and was immediately suppressed by the jury foreman's corrective instruction that the information was not relevant to the case. No juror's verdict on punishment was affected by the statement.

Equally clear is the trial court's view of the facts concerning the mention of the parole law. Faced with conflicting evidence as to whether the remarks were made during deliberation of the special issues or after the punishment verdict had been rendered, the trial court clearly demonstrated that it believed the latter. Moreover, the evidence clearly supports the trial court's implicit findings that the jury's ultimate decision on punishment was not affected by the mention of parole.

A trial court's decision as to whether jury misconduct has occurred will not be reversed on direct appeal absent an abuse of discretion. McIlveen v. State, supra. No abuse of discretion is demonstrated where the evidence is conflicting, Carrillo v. State, 566 S.W.2d 902 (Tex.Crim.App. 1978), or where there is evidence in the record to support the trial court's decision to overrule the new trial. On direct appeal, the Texas Court of Criminal Appeals implicitly held that the trial judge did not abuse his discretion in denying Petitioner's second amended motion for new trial, noting that among the juror's testifying at the hearing was one who testified that the comments were made after the verdict was reached and explicitly stating that conflict in the evidence on a motion for new trial is a matter

for resolution by the trial court. De La Rosa v. State, supra at 2 (Petition for Writ of Certiorari, Appendix A, at 2).

The present case falls squarely within this Court's holding in Smith v. Phillips, supra. As this Court noted:

> [D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable. The safeguards of juror impartiality, such as voir dire and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.

Id. at 217. Petitioner's allegations of juror bias are self-serving and totally unsupported by the record. The record reflects a jury capable and willing to decide the case solely on the evidence before it.

CONCLUSION

For these reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX

68976

FILED IN
COURT OF CRIMINAL APPEALS
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NO. 68976

IN THE

COURT OF CRIMINAL APPEALS

AUSTIN, TEXAS

JESSE DE LA ROSA,

Appellant,

VS.

THE STATE OF TEXAS,

Appellee.

ON APPEAL FROM THE

144TH CRIMINAL DISTRICT COURT

BEXAR COUNTY, TEXAS

BRIEF OF APPELLANT

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were actually true. Under such circumstances, the confession would have been like any other evidence, i.e., the jury would have been at liberty to accept the portion of the confession which admitted the homicide, but reject the portion dealing with the alleged robbery.

The Court's denial of the charge on murder, however, meant that even if the jury had a reasonable doubt about the robbery, its only choice was to either find him guilty of capital murder or to acquit him completely. This lack of a third alternative was prejudicial to Appellant. The tremendous social and psychological pressure that is placed on a jury in a death penalty case makes it relatively certain that they will not vote to completely acquit under any circumstances, even if they entertain a reasonable doubt as to an element of the offense. Had another alternative, short of acquittal, been offered to the jury, however, one cannot exclude the possibility that the instant jury would have elected to find Appellant guilty of a lesser included offense. London v. State, 547 S.W.2d 27 (Tex. Crim. App. 1977).

GROUND OF ERROR NUMBER EIGHT

THE TRIAL COURT ERRED IN FAILING TO SUPPRESS APPELLANT'S WRITTEN CONFESSION, WHICH WAS RENDERED INADMISSIBLE DUE TO THE OFFICER'S FAILURE TO HAVE THE DEFENDANT IMMEDIATELY BROUGHT BEFORE THE MAGISTRATE.

GROUND OF ERROR NUMBER NINE

THERE IS A DIRECT CAUSAL RELATIONSHIP BETWEEN THE OFFICER'S VIOLATION OF ARTICLE 15.17 AND THE OBTAINING OF APPELLANT'S CONFESSION.

GROUND OF ERROR NUMBER TEN

FAILURE TO TIMELY MAGISTRATE THE DEFENDANT WAS NOT RENDERED HARMLESS BY THE OFFICER'S GIVING OF THE MIRANDA WARNING, INASMUCH AS THE OFFICER DID NOT PROPERLY ADVISE THE DEFENDANT OF HIS RIGHT TO COUNSEL, AND THE OFFICER'S WARNINGS MAY NOT BE SUBSTITUTED FOR THE MAGISTRATE'S.

GROUND OF ERROR NUMBER ELEVEN

THE TRIAL COURT ERRED IN FAILING TO CHARGE THE JURY ON VIOLATION OF ARTICLE 15.17, INASMUCH AS IT WAS RAISED BY THE EVIDENCE AND PERTAINED TO THE ADMISSIBILITY OF THE CONFESSION.

Nothing is more precious to a criminal accused than that

assemblage of Constitutional rights which have come to be collectively known as the Miranda warning, and which are embodied in Article 15.17, Texas Code of Criminal Procedure.

Such rights are of no practical value to a defendant in police custody, however, unless the criminal justice system (1) ensures that the accused is informed by an independant judicial officer of exactly what his rights are and (2) the system guarantees the indigent accused access to legal counsel without delay. Thus evolved the requirements of Article 15.17, V.A.C.C.P., which states as follows:

> "Art. 15.17 - Duties of arresting officer and magistrate. In each case enumerated in this Code, the person making the arrest shall immediately take the person arrested before some magistrate of the county where the accused was arrested." (emphasis added)

The provisions of Article 15.17 are clear and mandatory. The necessity for immediately bringing the accused before a magistrate has been defined to mean without unnecessary delay. Hokr v. State, 545 S.W.2d 463 (Tex. Crim. App. 1977). The provision is intended to facilitate the rights of the accused, not the convenience of the arresting officer.

During the pre-trial motion to suppress and the guilt/innocence phase of the trial, the defense attacked the admissibility of Appellant's written statement (State's Exhibit 32), upon the grounds that Appellant was not brought before a magistrate until five full hours after his arrest and two and one half hours after his confession had been obtained by police.

Such flagrant and unwarranted delay in bring the Appellant before a magistrate violated the clear and mandatory requirements of Article 15.17, V.A.C.C.P. This conscious, deliberate and inexcuseable refusal to afford the Appellant his right to go before an independant judicial officer vitiated his confession and should have rendered it inadmissible before the jury.

This Court will not need to "read between the lines" of the record to make a determination as to whether the provisions of Article 15.17 were violated. The testimony of Detective Michalec makes it perfectly clear, by his own admission, that he violated the law. (III, P. 252). The evidence shows that Appellant was arrested at 5:30 in the afternoon (XVI, P. 133). The first thing the arresting officer should have done, under the law, was to attempt to take the Appellant before a magistrate. Detective Michalec admitted that made no such attempt. (XVI, P. 141, Lines 16-18). The municipal courts, as well as the magistrate's office, were located in the same building as the San Antonio Police Department. In the event a magistrate could not be found there, the Justice Courts were situated directly accross the street from the police department, not more than 200 yards from the homicide office. (XVI, P. 160). Notwithstanding this fact, Dectective Michalec made no attempts to find out if any of the municipal judges or justices of the peace were available at the time the defendant was taken into custody, or any any time thereafter. (XVI, P. 142). He did not ask any other person whether a magistrate was around, nor did he ask any other officer to check on the availability of a judge while he stayed with the Appellant . (XVI, P. 143). Instead of being brought immediately before a judge, the Appellant was brought immediately to the homicide office, where he was isolated with Detective Michalec for interrogation. (II, P. 212; XVI, P. 142-143).

Of course it is immaterial whether or not a night magistrate was on duty between the hours of 5:30 p.m. and 8:00 p.m. The fact is that any one of a number of other judges might have been available and the Detective would never have known, since he made no attempt to check if a judge was in the building, and quite obviously did not care to find out. That he was not

concerned about the availability of a magistrate is clearly demonstrated by the fact that the night magistrate came on duty at 8:00 p.m., that her availability at that time was well known to the officer, and that he still refused to take the Appellant before the magistrate. Volume II, Page 261 reflects the following testimony by Detective Michalec:

"Q. And you're testifying about your knowledge at the time that the magistrate was downstairs?

A. I wouldn't -- unless I would have called down there and actually wanted her, which I didn't at the time. I was taking the confessions from him and I took him down there after I completed them.

Q. You never took the trouble to call down there?

A. Well I wasn't going to take him down there. It's not our policy to take him down there. And I just took both confessions and then we had him magistrated.

At the time Appellant was arrested on a robbery warrant (II, P. 234) in connection with the shooting of Patricia Johnson, police had no probable cause to arrest Appellant for capital murder. The only evidence in existence was one fingerprint off a beer can (II, P. 24). Officer Michalec was a homicide detective with 12 years experience (II, P. 241). He was famililiar with legal standards of proof and knew that he had no case against Appellant for capital murder (II, P. 242). Extraction of a confession was imperative, for it was the only way a case could be made.

Detective Michalec was familiar with Jesse De La Rosa (II, P. 230) and was undoubtedly familiar with his low intellect. Michalec also had the Appellant's wife and brother in custody, supposedly for questioning. It was, thus, rather odd that none of the officers who testified at trial recalled questioning either George or Mary De La Rosa. Yet Officer Michalec continued to hold both under arrest without charges or warrants for some five additional hours, for no apparrent reason other than to exert pressure on the Appellant,

as evidenced by the fact that they were not released until immediately after the Appellant had signed a confession (II, P. 257).

By 8:00 p.m., when the night magistrate came on duty, Officer Michalec was continuing to hold George and Maria De La Rosa in custody, and had already obtained Appellant's signature on a confession to the Patricia Johnson shooting (II, P. 250). He had not advised Appellant of his right to be brought before a magistrate (II, P. 246). He lied to the Appellant by telling him that obtaining a court appointed lawyer would take a long time and that obtaining counsel would require proceedings before a District Judge, (II, P. 249), when in fact, the officer knew that a magistrate could appoint counsel for Appellant immediately (II, P. 249,255) and that a confession would then be out of the question.

Small wonder that Detective Michalec chose to begin writing up a second confession at precisely 8:02 p.m., two minutes after he knew the night magistrate came on duty. He continued to interrogate Appellant until 10:30. At that point, two and one half hours after the night magistrate came on duty, five hours after the arrest, and two confessions later, Detective Michalec decided to made his first attempt to comply with the law. (II, P. 261).

B. Failure To Immediately Take Appellant Before A Magistrate Was Not Due To Reasonable Or Excuseable Delay.

Officer Michalec's failure to bring Appellant immediately before a magistrate was the result of conscious disregard of the law, not reasonable or excuseable delay . When asked by defense counsel what prevented him from immediately bringing Appellant before a magistrate, Detective Michalec could cite no reason for the delay. (II, P. 251-252).

Detective Michalec did, however, state categorically that it was his policy not to magistrate defendants when taken into custody, and that it was his mode of operation to immediately bring defendants to the homicide

office for interrogation, instead (II, P. 251-252, 261). This Court is asked to review with care the following testimony of Detective Michalec, wherein he admits, with almost unbelievable candor, that because of his desire to interrogate Jesse De La Rosa, and for no other reason, he did not follow the law of Article 15.17 on the night of Appellant's arrest:

> "Q. Why, Detective Michalec, didn't you take him directly to a magistrate?
>
> A. Because we took him up to the homicide office for questioning.
>
> Q. Why didn'tyou take him directly to a magistrate?
>
> A. We just don't. It's just standard operating procedure.
>
> Q. It's too difficult to get a confession, is it not, when someone has been warned by a judge, someone separate and apart from a police officer, of his Constitutional rights. It makes it far more difficult to get a confession in that way?
>
> A. Are you telling me that, or are you asking me that?
>
> Q. Would you agree with that?
>
> A. I don't think so.
>
> Q. You don't think so?
>
> A. No. I don't see why.
>
> Q. You wouldn't take him before the magistrate first so he could be advised of his Constitutional rights before a judicial officer?
>
> A. We don't do that. It's not policy. We take somebody and we question them and we handle it this way.
>
> Q. It's not policy in the- it policy of the San Antonio Police not to follow the law?
>
> A. Well, I don't know if its a question of law. We don't do it.
>
> Q. You don't follow the law that the defendant shall be immediately taken before a magistrate?
>
> A. As far as - we didn't that night and that's about all I can tell you. Now as far as you questioning me why we didn't do it, we just don't do it, and we don't in most cases. We don't take them to the magistrate. We take them to the homicide office and we talk to them first.
> (II, P. 251-252, Emphasis supplied)

Appellant is not aware of any previous Texas case decided by this Court in which the arresting officer has actually admitted on the record that he violated the provisions of Article 15.17. The record is patently clear, and cannot be ignored by this Court. Detective Michalec was clearly aware

of the dictates of Article 15.17 and that it required him to bring Appellant before a magistrate "as soon as possible", in his words. Detective Michalec's definition of "as soon as possible", however, turned out to be whenever he happened to finish getting a confession. (II, P. 261,251-52, XVI, P. 142). By the officer's own admission Appellant was to be magistrated only after the officer had finished getting a confession, and not before.

Article 15.17 was enacted as a safeguard to prevent the evils and abuses which can and do occur if criminal arrestees are isolated in custodial interrogation without access to an independent judicial authority, literally at the mercy of the arresting officer . Detective Michalec admitted the only reason Appellant was not timely magistrated with the officer's personal decision to keep him in custodial interrogation without benefit of being advised of his rights by a judicial officer.

To say that the conduct of incognito interrogation,which Article 15.17 was designed to guard against, shall now serve in the mind of the officer as the excuse for violating that very law is a perverse theory which this Court must not sanction. Is this Court to say that a defendant need not be brought before a judicial officer until after the police in their sole discretion have done everything they wish to the accused? Appellant thinks not. The prospect of such a precedent would be too frightening to contemplate. Over-zealous officers, like Detective Michalec, would be at liberty to keep a criminal defendant in custodial interrogation for hours, days or longer, knowing that not until the police choose to end the interrogation will the accused have the benefits of magistration, as well as access to the judge- the only person who can appoint counsel for the accused. Even if an accused attempted to invoke his right to counsel during interrogation, by requesting an appointed attorney, the officer would know that the defendant will not have access to such counsel unless he is brought before the magistrate. If,

however, it is the officer who alone retains the control over the length of time before the defendant is magistrated, then the right to counsel is rendered virtually worthless for an indigent defendant who depends upon the court for an appointed attorney.

In the instant case, Detective Michalec decided for himself that Appellant simply would not be magistrated until the officer had succeeded in obtaining a signed statement. (II, P. 261). In this case, it took the officer five hours to achieve this goal. Appellant wonders how many days, or even weeks it will take next time, if restraints are not placed upon this kind of conduct. So long as the personal modus operandi of the officer, rather than the requirements of the statute, is what dictates when the defendant is to be magistrated, then the door to flagrant abuse will remain open.

C. The Harm Arising From Failure To Magistrate Was Not Mitigated By the Officer's Administration Of The Miranda Warning.

D. There Is A Direct Causal Link Between The Failure To Magistrate The Appellant And The Obtaining Of His Signature On A Confession.

There is a clear and ascertainable causal link between Officer Michalec's failure to magistrate the Appellant and the officer's ability to get Appellant to sign a confession typed up and prepared by that same officer. This causal link is evidenced by a number of facts and circumstances, not the least of which was the officer's admission that the obtaining of a confession was, in fact, the very reason for Appellant's continued detention without magistration.

The motivations of Officer Michalec for obtaining Appellant's confession were very strong. It is common knowledge that homicide officers derive their professional status and reward from "getting their man". For Officer Michalec to get his man in this case, meant that he had to get a confession, for there was no other probative evidence in existence.

Officer Michalec had known Appellant for some time, and had made

himself appear friendly to Appellant in the past. (II, P. 232). Despite his outwardly friendly appearance, his real intent was to have Appellant sign a confession which he knew would lead to a conviction for which Appellant could receive the death penalty. The emotional pressure to which Appellant was subjected was obviously great. Beatings, it is well known, are not the only way in which confessions may be extracted from an accused. Other, more subtile forms of pressure may be just as effective. Appellant was forced to undergo custodial interrogation for over five hours during which time he was not allowed to leave the interrogation room. There is no indication that he was given food or allowed to go to the bathroom. If the state's own witness is to be believed, Appellant had to have been under great pressure, assuming that he just been told that he would either face a life sentence or death, if convicted of capital murder. (II, P. 248). Appellant, who had asked for his brother, clearly did want to speak to some other person, but did not know that an attorney could be immediately be appointed for him. The reason he did not know this was because Officer Michalec intentionally lied to the defendant and told him that getting an appointed attorney was a time consuming process requiring "proceedings" before a District Court judge. (II, P. 249; XVI, P. 148). Appellant was arrested at night. Since Appellant had not been told that he had a right to be brought before a magistrate <u>that evening</u>, he was obviously and falsely led to believe that such mythical "proceedings" before a district judge would have to wait until the next business day, some twelve to fourteen hours later, if not longer. Access to an attorney was intentionally made to look a long way off. Detective Michalec had no right to "qualify" Appellant's right to immediate counsel; to do so was to misinform the accused, which is as damaging as not informing him at all under these kinds of circumstances. In the meantime, Appellant was a police prisoner, faced with the necessity of

making an immediate decision, knowing all the while that his innocent wife and brother were being held in custody by Detective Michalec with no indication as to when when,or if,they were to be released. Not knowing that he could have seen a lawyer immediately, Appellant asked to see his brother. George and Maria De La Rosa, still in custody for no apparent reason, were led into the interrogation room, where they both became histrionic and begged Appellant to do what was necessary to obtain their release. (II, P. 21,23). During this tense and emotional transaction, detective Michalec was undoubtedly aware that Appellant, if brought before a magistrate on a capital charge, would be immediately appointed counsel, and that counsel in capital cases immediately stop all questioning. Not surprisingly, no appearance before the magistrate was made, and no lawyer was appointed until Appellant had signed his own death warrant.

Whether or not Officer Michalec read Appellant his Miranda warning is immaterial. Anytime an accused is in the sole custody of an interrogating officer, a swearing match may arise as to whether that officer adequately and properly administered the warnings. It is for this precise reason - to provide independant verification that an accused has been advised of his rights and has had the opportunity to exercise them - that Article 15.17 exists. In the present case, of course, the officer as much as admitted that the Miranda warning was <u>not</u> properly administered. To tell the accused that he had a right to counsel, but that such right was only exerciseable <u>in the future</u> undercuts the entire substance of the Miranda warning,which stands for the principle of <u>immediate</u> access to counsel and cessation of questioning as soon as the right is invoked.

The arresting officer's warnings under Art. 38.22 V.A.C.C.P. are to be in addition to the warnings administered by the magistrate, not an alternative thereto. Were this not the case, then Article 15.17 would

have been done away with long ago. Neither is the arresting officer a substitute for the magistrate. Clearly it is the magistrate, and not the officer, who may appoint counsel, fix bail, and conduct an examining trial.

If this Court fails to grant Appellant a new trial, it will be tantamount to an approval of the actions of detective Michalec, as well as an invitation to other law enforcement officers to act as sole arbiters of when a defendant shall be afforded his right to be brought before the magistrate. For this Court to so hold would emasculate the provisions of Art. 15.17 and the constitutional safeguards contained therein. Appellant respectfully submits that since the Legislature has not elected to do away with Article 15.17, neither is this Court at liberty to do so. The Officer's conduct was clearly reversible error. Prince v. State, 231, S.W.2d 419 (Tex. Crim. App. 1950).

The trial court, moreover, erred in failing to submit the entire instruction requested by the defense regarding Article 15.17. The defense requested that the court instruct the jury on the duties of the magistrate under Article 15.17. The basis for the requested instruction was that, not unless the jury was told what the magistrate would have done, was it in a position to tell whether the officer's failure to magistrate resulted in the taking of an involuntary or unknowing confession. The evidence raised the issue of a causal link between the failure to magistrate and the taking of the confession; thus, the failure to magistrate was an integral part of the issue of voluntariness. Whenever the issue of voluntariness is raised, the Court must charge the jury on the applicable law. Art. 38.22(7), V.A.C.C.P. Its failure to do so in this case was error.